IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.212 OF 2006
IN
WRIT PETITION NO.19 OF 1990

Fali Pirozshah Bomanji & Ors. .. Petitioners
V/s
Union of India & Ors. .. Respondents
And
Ajmera Housing Corporation .. Applicant

Senior Advocates Mr.E.P.Bharucha, Mr.Janak Dwarkadas, and Mr.T.Subramaniam with Mr.S.Cooper i/by M/s.Purnanand & Co. for the Petitioners.

Mr.S.R.Rajguru with Mr.R.C.Master for the Respondents.

Mr.Shyam Mehta with Mr.P.B.Kahadi i/by M/s.Doijode & Associates for the Applicant.

CORAM : DR.S.RADHAKRISHNAN &
SMT.V.K.TAHILRAMANI, JJ.

DATE : 6th December, 2006.

P.C.:

1. The Applicant is a firm duly registered under the Indian Partnership Act, 1932, carrying on business of construction of buildings both for residential and commercial purposes for the last 25 years by the name of Ajmera Housing Corporation.

2. The Petitioners were carrying business of manufacturing salt in the name of M/s.Shepherd Salt Works and M/s.Shepherd Annexe Salt Works, on lands leased to them by the Union of India, Respondents herein. Thereafter by an order dated 1st December, 1989 the lease granted in favour of the Petitioners was

terminated by the Respondents. The original petitioners (late Fali Bomanji and Pervin Tata) challenged the said order in Writ Petition No.19 of 1990 seeking a declaration from this Court that the deed of lease dated 16th February, 1922 (Registration No.273) with the subsequent deed of assignment dated 24th October, 1928 and the agreement between the Court Receiver, High Court, Bombay and late Coomibai Bhartania dated 3rd December, 1941 are valid, subsisting and binding upon the Respondents and that the Petitioners are entitled to all rights, title and interest in respect of the land mentioned therein and to set aside the order dated 1st December, 1989, passed by Respondent No.2 terminating the leasehold rights of the Petitioners.

3. The aforementioned Writ Petition was admitted by this Court by an order dated 16th April, 1991 and is pending hearing and final disposal. The original Petitioners (since deceased) executed a Heads of Agreement on 7th April, 1986 in favour of the Applicant in respect of the said land. The said deceased had agreed that in the event the Applicant succeeds in procuring the release of the portion of the said land from reservation and necessary sanctions and/or permissions enabling the development of the said land, the Applicant would be among other things entitled to develop half of the total area of the developable portion of the said land. However the said applications

were to be pursued by the Applicant at its own cost and responsibility. Before the execution of the said Heads of Agreements the applicant had paid substantial amounts to the said deceased and certain other expenses were also incurred in that behalf.

4. The deceased Petitioner No.1 had also executed a Power of Attorney dated 12th May, 1986 in favour of the Applicant pursuant to which the Applicant had made several applications and representations to various authorities of the Central and State Government for removal of reservation and grant of sanction for development of the said land.

5. Thereafter by an order dated 13th April, 1989, the Respondent No.3 purported to terminate the lease and threatened to take possession of the said land on 25th April, 1989. Subsequent thereto a Memorandum of Understanding (hereinafter MOU) dated 9th May, 1989 was entered into between the original Petitioners and the Applicant, expressly agreeing to execute an assignment deed in respect of the said land in favour of the applicants within 60 days from getting the order of termination of lease set aside for a lump sum consideration of Rs.15 crores for an aggregate area of 467 acres and 39 gunthas was executed. Under the MOU the applicant was entitled to assignment of the entire land. The applicant had agreed to bear all expenses

relating to the proceedings for setting aside the order dated 13th April, 1989. The said MOU records that the deceased Petitioner No.1 and the Petitioner No.2 had agreed and covenanted that they shall not sell, transfer, assign or sub-lease or grant permission to any third party in respect of the said land. It also declared that the power of Attorney of 12th May, 1986 was in force. The execution of the proposed deed of assignment was subject to grant of prior permission by the Respondents. The said order of 13th April, 1989 was quashed and set aside by an order of this Court dated 12th June, 1989 in Writ Petition No.1456 of 1989. By the said order dated 12th June, 1989 the Respondents were directed to give a hearing within 3 months and decide the matter afresh. The said deceased Petitioner No.1 and Petitioner No.2 were thereafter granted a personal hearing by Respondent No.2 on 19th July, 1989 at Jaipur which was attended by the said deceased and others. Respondent No.2 thereafter by the order dated 1st December, 1989 once again purported to terminate the lease of the said land.

6. In the meanwhile, the State Government attempted to acquire the said property by issuing notices u/s.4 and 6 of the Land Acquisition Act, 1894. The Applicant claims that it had made numerous representations to various Ministries, Departments and Authorities of the State Government including the authority under the Urban Land

Ceiling Act for withdrawal of the said notices. After all their efforts failed the Applicant and the said deceased Petitioner No.1 filed Writ Petition No.1361 of 1988 which was dismissed by this Court but the Hon'ble Supreme Court by an order dated 13th April, 2000 had set aside the order of this Court and restored the same on the file of this Court. The said Writ Petition No.1361 of 1988 is pending for hearing and final disposal in this Court.

7. Mr.Shyam Mehta, the learned Counsel appeared on behalf of the Applicant made the following submissions:-

a) It has been contended by the Applicant that subsequent to the execution of the MOU, the Applicant has from time to time reimbursed all the expenses incurred in prosecution of the aforesaid writ petition including the Advocates fees, expenses incurred by the said deceased Petitioner No.1 for visiting Jaipur for hearing before Respondent No.2, etc.

b) It has been claimed by the Applicant that by a letter dated 1st August, 1993 the said deceased Petitioner No.1 confirmed to the Applicant that the said MOU is valid and subsisting and stated that the transaction would be concluded within 60 days of

restoration of the lease.

c) Fali Bomanji died on 18th March, 2004 and thereafter by an application his heirs and legal representatives were brought on record.

d) The Applicant claims that the Applicant was taken by surprise on receiving a letter dated 26th December, 2005 signed by Petitioners No.1/1 to 1/4 and by Petitioner No.1/3 purportedly the constituted Attorney of Petitioner No.2 claiming to be legal heirs of the deceased and alleging that the applicant had no authority to represent thier interests in the said land. It was further stated in the said letter that the said MOU dated 9th May, 1989 was invalid and that it was abandoned and rendered inoperative several years ago.

e) It has been contended that the petitioners by the said letter purported to terminate all the agreements between the parties and that the Applicant came to know of the death of the said Fali Bomanji for the first time only through this letter.

f) The learned Counsel for the Applicant submitted that the Petitioners also alleged that by a letter dated 22nd April, 1994 addressed by the said deceased Petitioner No.1 to the Applicant recorded

that the MOU was invalid. It was contended that despite repeated requests the petitioners had failed to give inspection or copy of the said letter and hence it has been contended that there is no such letter or that it is forged and fabricated. The Applicant vehemently denied that the said letter in any way recorded or made to understand between the Applicant and the deceased Petitioner No.1 that the MOU was invalid or abandoned.

g) The Applicant has claimed that there is a valid and subsisting contract between the Applicant and the petitioners wherein the rights of the petitioners in the said land have been agreed to be assigned in favour of the Applicant, subject to consent of the Respondents. It has also been stated that the deceased (consequently Petitioner Nos.1/1 to 1/4) and Petitioner No.2 have received substantial benefits under the said Heads of Agreement and the MOU.

h) Mr. Mehta, the learned Counsel for the Applicant, has contended that the stand of the Petitioners in respect of the said MOU and the recent conduct of Petitioner Nos.1/1 to 1/4 in the said Writ Petition No.1361 of 1988 where they obtained an order behind the Applicant’s back (although the Applicant is a Co-petitioner therein)

shows that they may compromise the Writ Petition No.19 of 1990 with the Respondents. It has thus been submitted that in the light of the said MOU the Petitioners be not entitled to compromise or withdraw the writ petition without taking the applicant into confidence.

i) Thus, Mr.Mehta, the learned Counsel for the Applicant has submitted that the Applicant is a necessary party to effecively adjudicate the issues raised in the petition, and hence he prayed that this Court should direct the Petitioners to join the Applicant as a Respondent with liberty to be transposed as a petitioner in the event of the Petitioners compromising and/or withdrawing the above writ petition.

j) Mr.Mehta also contended that if the aforementioned relief is not granted, it is likely that the Applicant will be deprived of its invaluable rights and grave and irreparable harm and prejudice will be caused to the Applicant.

k) Mr.Mehta, the learned Counsel for the Applicant very categorically stated that the Applicant will wholly support the Petitioners in the above Petition.

8. Mr.Barucha, the learned Senior Counsel who appeared on behalf of the Petitioners raised the following objections:

a) It has been contended on behalf of the Petitioners that the Applicant is neither a lesee nor has any interest in respect of the said land or is in any way concerned with the manufacture of salt on the said land the same being only a matter between the Petitioners and the Respondents. The Applicant, it has been argued therefore has no locus standi in the Writ Petition No.19 of 1990. It has been argued that the Application suffers from gross delay and /or laches in as much as the Petition was filed in January, 1990 and it is only in 2006 that the Applicant is seeking to get impleaded as a party Respondent in the above Petition.

b) It has been vehemently urged by Mr.Bharucha, the learned Senior Counsel on behalf of the Petitioners that there is no subsisting agreement of any nature whatsoever between the applicant and the original petitioners in respect of the said property. The Heads of Agreement had lapsed and come to an end upon the expiry of 3 years from the date of the said agreement and came to an end on the execution of the MOU dated 9th May, 1989 between the original

petitioner and the Applicant. It has been argued that no right therefore would be available to the applicant from the said Heads of Agreement.

c) As regards the MOU it has been claimed that the same was abandoned and/or given a go-bye and/or has been rendered inoperative and/or was never acted upon by the parties. It has been claimed that the said MOU has been expressly terminated. It has been further argumed that the said MOU or heads of agreement does not create any right in respect of immovable property. The Applicant is therefore neither a proper nor a necessary party.

d) It has been contended that despite unqualified assertions on part of the petitioners long ago, that the Applicant has no right of any nature with respect to the said land, and that the Applicant had shied away and had not challenged the same and thus admitted the same.

e) Mr.Bharucha, the learned Senior Counsel for the Petitioner has contended that assuming but denying that there is any subsisting MOU between the Applicant and the Petitioner’s predecessor in title, the same would be patently incapable of being performed as the same was violative of provisions of Chapter XX (C) of the Income Tax Act as then in force

as no application was made in Form 37-I as required by the provisions of Income Tax Act. Thus the Applicant it has been argued cannot calim any right under the said MOU.

f) It has been denied by the Petitioners that the Applicant has paid any ‘substantial amount’ to late Fali Bomanji and has been claimed that the Applicant has not paid more than an aggregate amount of Rs.7,00,000/- under the said Heads of Agreement, and that no amount in respect of consideration under the Heads of Agreement or by way of reimbursement to the deceased were paid. It has been contended that the Heads of Agreement had come to an end upon execution of the MOU dated 9th May,1989 and thus all claims of the Applicant relating to the said Heads of Agreement would be inconsquential and have no legal effect whatsoever.

g) With respect to Writ Petition No.1361 of 1988 filed by the Original Petitioners and the Applicant, the present Petitioners have claimed that since that Petition was filed in view of the Heads of Agreements then in force and it having been replaced by the MOU and the MOU itself having been abandoned or given a go-bye, the Applicant is neither a necessary nor a proper party to the said Petition.

h) It has been submitted by the Counsel for the Petitioners that there was no order obtained behind the Applicant's back. In fact there is no connection between Writ Petition No.1361 of 1988, which relates to the proceedings under the Land Acquisition Act and Maharashtra Regional Town Planning Act, while the present Petition (W.P.No.19 of 1990) challenges the orders dated 1st December,1989 and letter dated 28th December,1989 issued by the Respondents and also seeking permission to allow the Petitioners to continue their business as Salt Manufacturers and thus the Applicant, it has been argued is not connected in any way with the present Petition.

i) It was also contended by Mr.Bharucha that the Applicant had no right, title or interest with respect to the said property and relied upon the case of **Rambhau Namdeo Gaire Vs.Narayan Bapuji Dhotra - (2004) 8 SCC 614**. It has also been contended that the Applicant is not a necessary party to Writ Petition No.19 of 1990. With reference to contention that the Applicant is not a necessary party (i.e. the present Petition), Mr.Bharucha cited the cases of **Jivanlal Vs.Narayan AIR 1972 Bom 148 and Kasturi Vs. Iyyanperumal & Ors. (2005) 6 SCC 733.**

. Paragraph 7 of the said judgment lays down two tests to determine who is a necessary party.

> "7. .....Tests are (1) : there must be a right to same relief against such party in respect of the controversies involved in the proceedings; (2) No effective decree can be passed in the absence of such party."

. Paragraph-11 of the same judgment specifies two tests to be satisfied by a proper party which are as follows :-

> "11. .....(T)wo tests are required to be satisfied to determine the question who is a necessary party. ..... For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the Contract for Sale. Thus, the question is to be decided keeping in mind the scope of the suit....."
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> Further in Paragraph 13,
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> "From the aforesaid discussions, it is pellucid that necessary parties are those persons in whose absence no decree can be passed by the court or that there must be a right to some relief against some party in respect of the controversy involved in the proceedings and proper parties are those, whose presence before the Court would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief in the suit was claimed against such person."

9. On hearing the Petitioners, Respondents and the Applicant, the following questions have arisen for consideration, which are required to be answered in order to determine whether the Applicant can be joined as a Respondent to the aforesaid Writ Petition No.19 of 1990.

1. Whether the Applicant is a necessary or a

proper party to Writ Petition No.19 of 1990 and has any locus standi thereto ?

2. Whether the MOU stands expressly terminated vide letter dated 22nd April,1994 ?

3. Whether non filing of Application form under section 37-I of the Income Tax Act is a material ground to deny the applicant right to join the Petition?

4. Whether, if the Applicant is not joined as a Respondent to the said Petition, it is likely to deprive him of his invaluable rights and grave and irreparable harm and prejudice may be caused to him?

10. The present Chamber Summons presents a very peculiar situation before us. The Applicant, who seeks to be joined as a Respondent to the Petition No.19 of 1990, in his oral submissions, Mr.Mehta, the learned Counsel on behalf of the Applicant has expressly stated that the Applicant will fully co-operate with the Petitioners in setting aside the order of the Commissioner dated 1st December,1989 and will fully support the Petitioners in the Petition. This, of course is in the light of the circumstances surrounding the Petition wherein the Applicant pursuant to its agreement for sale with the Original Petitioners, have acquired interest in respect of the said property. As seen in the aforementioned judgment of **Kasturi (Supra)** a party, whose presence before the Court would be necessary in order to effectually and completely adjudicate upon and settle all the questions involved is a proper party. In the light of this definition it becomes clear that the Applicant is

a proper party. In the Writ jurisdiction of the High Courts under Article 226 of the Constitution of India, the provisions of the Civil Procedure Code, 1908 need not be strictly construed. Thus order I Rule 10 should not be so rigidly construed that a party is denied of his right completely. The concerns raised by the Applicant that an order or settlement may be entered into by the Petitioner "behind the Applicant's back" wholly dispossessing it of its rights is not ill founded. Therefore, as regard the first question, we answer it in the affirmative that the Applicant is a property party.

11. Coming to the letter dated 22nd April,1994, the very fact that the letter expresses the original Petitioners concern about the non filing of the Application under section 37-I of the Income Tax Act shows their willingness to enforce the agreement, subject to the permissions of the Respondents and the outcome of the earlier Petition. Moreover, the letter does not in any manner whatsoever terminate the MOU or give it a 'go-bye'. In fact the reluctance of the Petitioners to produce the letter and its production only at this stage also points to the fact that nowhere does it express the deceased Petitioner's willingness to terminate either the agreement or the MOU and is a last ditch effort on behalf of the

Petitioners to make out a case which is not present. Therefore, we answer the second question in the negative.

12. The third question vis a vis the application under Sectin 37-I of the Income Tax Act is irrelevant at this stage. It may be urged at the time of final hearing and disposal of the Petition itself and hence will not be a reason enough to deny a party its right to seek relief against palpable injury. Thus the third question is also answered in the negative. We also do not find any substance that the above Chamber Summons suffers from delay, as the objection came only in December, 2005.

13. On a perusal of the MOU as well as the Heads of agreement it becomes very clear that a large sum of money has been expended by the Applicant to finance litigation with regard to the said property. Also up to the year 2004, that is till the death of the original petitioner Fali Bomanji, no steps were taken to terminate the agreement of sale or the MOU. It is important to note that till 2004, the deceased Petitioner No.1 Fali did not terminate the above MOU. Now after his death, his legal heirs are trying to dispute the MOU. In fact the Applicant is a joint Petitioner with respect to Writ Petition No.1361 of 1988 which is pending for final hearing. As claimed

by the Applicant whereby an order was obtained in Writ Petition No.1361 of 1988, behind the back of the Applicant, the Applicant fears that if the present Petition is withdrawn or compromised, it may completely destroy the Applicant's right. This fear in our opinion is not ill founded and hence in the larger interests of justice and so as not to cause irreparable harm and prejudice to the Applicant, who has invested so much time and money in the said land, we believe that it is necessary to join him as a party Respondent to the Petition No.19 of 1990. The express assurance of the Applicant is that it will fully co-operate with the Petitioners in order to set aside the Commissioner's order dated 1st December,1989 has also been a material factor in granting it this relief. The Applicant be allowed to be impleaded as a party Respondent in the above Petition. The Petitioners to carry out the amendment within a period of 16 weeks.

14. Chamber Summons is allowed accordingly with costs.

(SMT.V.K.TAHILRAMANI,J.) **(DR.S.RADHAKRISHNAN,J.)**